United States Court of Appeals for the District of Columbia Circuit

No. 19-5090

September Term, 2019

Filed On: June 23, 2020

EAGLE TRUST FUND, ET AL.,

APPELLANTS

V.

UNITED STATES POSTAL SERVICE AND MEGAN J. BRENNAN, IN HER OFFICIAL CAPACITY AS POSTMASTER GENERAL,

APPELLEES

Appeal from the United States District Court for the District of Columbia (No. 1:17-cv-02450)

Before: TATEL and RAO, Circuit Judges, and SILBERMAN, Senior Circuit Judge.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. See FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. See D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed for the

reasons stated in the memorandum accompanying this judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy Deputy Clerk Eagle Trust Fund, et al. v. United States Postal Service and Megan J. Brennan, in her official capacity as Postmaster General

No. 19-5090

MEMORANDUM

This case arises from a mail dispute over a change-of-address request filed by Eagle Forum (a non-party) and opposed by plaintiffs Eagle Trust Fund, John Schlafly, and Eagle Forum Education & Legal Defense Fund. The U.S. Postal Service concluded that Eagle Forum should be the recipient of the contested mail. The plaintiffs then filed this suit contending that the Service erred in three principal respects: (1) the Service failed to engage in reasoned decisionmaking, (2) the Service failed to follow its own binding regulations, and (3) the Service's administrative review provisions violate due process by not providing for reconsideration in light of after-arising grounds or evidence. The district court granted the Service's motion to dismiss for failure to state a claim. Eagle Tr. Fund v. U.S. Postal Serv., 365 F. Supp. 3d 57, 63 (D.D.C. 2019). The court reasoned that the plaintiffs have no cause of action under which to bring their first two challenges, and it concluded that the due process challenge fails on the merits. *Id.* at 64–70. We affirm largely for the same reasons.

Nearly all of the plaintiffs' arguments on appeal understandably aim at identifying an available cause of action under which their first two challenges may proceed. Review under the Administrative Procedure Act, 5 U.S.C. §§ 500 et seq., is unavailable here in light of 39 U.S.C. § 410(a), which states that, with certain exceptions not relevant here, "no Federal law dealing with public or Federal contracts, property, works, officers . . . including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise

of the powers of the Postal Service" (emphasis added). See Mittleman v. Postal Regulatory Comm'n, 757 F.3d 300, 305 (D.C. Cir. 2014). The plaintiffs argue that a few different sources of "non-APA and pre-APA review" still remain for their first two challenges. Appellants' Br. at 23. But we have explained that such "non-statutory" review is "quite narrow," and is available "only to determine whether the agency has acted 'ultra vires'—that is, whether it has 'exceeded its statutory authority." Mittleman, 757 F.3d at 307 (quoting Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1173 (D.C. Cir. 2003)).

Neither of the first two errors alleged by the plaintiffs amounts to ultra vires action. As an initial matter, neither challenge even mentions a statute, much less alleges a violation of one. See J.A. at 64–67. The Service's purported lack of reasoned decisionmaking stems from its failure to account for the intent of senders who ambiguously address mail to the "Eagle Forum" or to "Eagle Forum, Attn: Phyllis Schlafly." Id. at 64–65. That is a heartland arbitrary-and-capricious challenge under the APA, not a claim that the Service exceeded its statutory authority.

Perhaps recognizing that none of our decisions have placed an agency's failure to follow its own regulations in the "ultra vires" category, the plaintiffs before the district court and on appeal attempt to recast their second challenge as alleging a violation of due process, which, they argue, itself constitutes ultra vires action by the agency. But a constitutional claim is separate from an ultra vires claim. See Sears, Roebuck & Co. v.U.S. Postal Serv., 844 F.3d 260, 265 (D.C. Cir. 2016) (collecting and summarizing none of which include cases, constitutional claims within ultra vires review). Certain constitutional claims might—we don't decide that here—be brought on their own where a statute that forecloses APA review does not meet the "heightened showing" we require of Congress to preclude review of constitutional claims. Webster v. Doe, 486 U.S. 592, 603 (1988). And our opinions to that effect do not speak in terms of ultra vires review. See, e.g., Gill v. U.S. Dep't of Justice, 875 F.3d 677, 683–84 (D.C. Cir. 2017) (Tatel, J., concurring). So while the plaintiffs might be able to bring a constitutional challenge and attempt to argue that due process requires the Service to follow its own regulations, they have not in fact done so here. The relevant portion of the complaint says nothing about due process or the Constitution, see J.A. at 66–67, and we reject the plaintiffs' attempt to shoehorn their second challenge into the ultra vires category on that basis.

The plaintiffs urge next that constitutional avoidance should lead us to expand judicial review of the Service's decision beyond the limits set out in Mittleman. Those limits, they argue, would in effect unconstitutionally vest the judicial power in non-Article III courts. But even if we thought such an argument had merit, we are not free to sidestep *Mittleman*. Again, in *Mittleman* we stated that nonstatutory review is available "only to determine whether the agency has acted ultra vires," 757 F.3d at 307 (internal quotation omitted), a statement we later described as *Mittleman's* "holding," *Sears*, Roebuck & Co., 844 F.3d at 265. A party may bring an actual Article III challenge in the future (unlike the plaintiffs here), but one panel may not overrule another even where a party argues that a prior decision raises constitutional concerns. See United States v. Eshetu, 898 F.3d 36, 37 (D.C. Cir. 2018).

The plaintiffs have not appealed the dismissal of their challenge to the Service's administrative review provisions as violative of due process. Similarly, while the plaintiffs purport to appeal the denial of their motion to alter the district court's judgment, they provide no argument as to how the district court abused its discretion in applying the standards governing Federal Rule of Civil Procedure 59(e). In any event, the district court did not err because it too was bound by *Mittleman* despite any constitutional concerns. Finally, we will not address the plaintiffs' Appointments Clause challenge, which they raised for the first time on appeal. *See Salazar ex rel. Salazar v. Dist. of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 1:17-cv-2450 (KBJ)

EAGLE TRUST FUND, et al., Plaintiffs,

v.

UNITED STATES POSTAL SERVICE, et al., Defendants.

MEMORANDUM OPINION

Over the course of fifty years, conservative political activist Phyllis M. Schlafly created numerous "educational, advocacy, and policy groups," each of which she branded with an "Eagle"-themed name. (Am. Compl., ECF No. 20, ¶¶ 30, 31.) Among those entities are plaintiffs Eagle Trust Fund ("ETF") and Eagle Forum Education & Legal Defense Fund ("EFE-LDF"), as well as non-party Eagle Forum. (See id. $\P\P$ 2-3, 6, 31.) Each of Schlafly's "Eagle" organizations traditionally received its mail through one central post-office box in Alton, Illinois; significantly, much of this mail was addressed to some variation of "Phyllis Schlafly, Eagle Forum," without regard to the particular "Eagle" entity the correspondence actually concerned. (See Postal Service Initial Decision ("Initial Dec."), Ex. A to Defs.' Mot. to Dismiss, ECF No. 17-1, at 4.)¹ This centralized landing spot for the various entities' correspondence changed in 2016, when the

Page-number citations to the documents that the parties have filed refer to the page numbers that the Court's electronic filing system automatically assigns.

organization known as Eagle Forum veered from the flock under new leadership (due to a legal dispute), and submitted a "change of address" form to the United States Postal Service ("USPS"). (*Id.* at 6.) Plaintiffs ETF and EFE-LDF have now combined with John Schlafly—Phyllis Schlafly's son, who serves as a trustee or officer of ETF and EFE-LDF—to file the instant lawsuit against USPS. (See Am. Compl. ¶¶ 2–4.) Plaintiffs claim that ETF's and EFE-LDF's mail matter is being improperly diverted to Eagle Forum's new address, and they request reversal of an administrative ruling upholding USPS's decision to honor Eagle Forum's change-of-address request. (*See id.* ¶ 1.)

Before this Court at present is USPS's motion to dismiss Plaintiffs' first amended complaint for lack of subject-matter jurisdiction and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(1) and (6). (See Defs.' Mot. to Dismiss ("Defs.' Mot."), ECF No. 21.) Because Plaintiffs' complaint does not identify a cause of action and otherwise fails to state a claim for the purpose of Rule 12(b)(6), as explained below, USPS's motion and Plaintiffs' GRANTED. action will **DISMISSED** without prejudice. A separate Order consistent with this Memorandum Opinion will follow.

I. BACKGROUND2

A. BASIC FACTS

Phyllis Schlafly began leasing P.O. Box 618 in Alton, Illinois in 1967, the same year that she created Eagle Trust Fund. (See Initial Dec. at 4.) Most, if not all, of her Eagle-themed organizations received mail at that P.O. Box for almost fifty years, and as mentioned above, said correspondence was typically addressed to some variation of "Phyllis Schlafly, Eagle Forum[.]" (*Id.*) This centralization of the different organizations' mail matter was not inherently problematic because "[a]ll of Mrs. Schlafly's Eagle entities functioned in consonance" (Am. Compl. ¶ 32), and Eagle Trust Fund provided "back-office management, bookkeeping, and mail services for the other organizations" (Initial Dec. at 5). Thus, Eagle Trust Fund employees sorted and distributed the mail that was delivered to P.O. Box 618 (and a related street address) for all of the "Eagle" entities, including Eagle Forum. (See Am. Compl. ¶¶ 32, 38.)

In 2016, members of the organization known as Eagle Forum clashed with Phyllis Schlafly, "based in part on their holding political and social positions dissonant with Mrs. Schlafly and the other Eagle entities." (Id. ¶ 33.) According to the amended complaint, six Eagle Forum directors "secretly agreed among themselves to try to take control" of

The facts recited herein are drawn from the allegations in Plaintiffs' complaint, as well as from the written decisions in the underlying administrative proceedings, which the complaint incorporates by reference. See R.J. Reynolds Tobacco Co. v. USDA, 130 F. Supp. 3d 356, 369–70 (D.D.C. 2015).

Eagle Forum and "to remove Phyllis Schlafly and John Schlafly from their longstanding authority over [Eagle Forum's] accounts and assets." (Id. ¶¶ 33, 34.) As a result, Mrs. Schlafly "formally and expressly revok[ed] any and all existing licenses that [Eagle Forum] held to use her name, image, and likeness, as well as any intellectual property under her control." (Id. ¶ 36.) Ultimately, an Illinois state court designated new, acting leadership for the Eagle Forum organization. ($See\ id$. ¶ 37; Initial Dec. at 5–6.)

Soon thereafter, Eagle Forum's new leadership filed a change-of-address request form with USPS, thereby asking that any and all mail that was addressed to "Eagle Forum" at P.O. Box 618 and the related street address be forwarded to Eagle Forum's new place of business. (See Am. Compl. ¶ 38; Initial Dec. at 6.) As a trustee of ETF and an officer and director of EFE-LDF (see Am. Compl. ¶ 4), John Schlafly opposed Eagle Forum's change-of-address request, leading to the administrative proceedings that underlie the instant mail dispute. (See Initial Dec. at 6); see also 39 C.F.R. Part 965 (governing "Proceedings Relative to Mail Disputes").

On September 15, 2017, an Administrative Judge issued USPS's Initial Decision regarding the mailmatter conflict. (See Initial Dec. at 3); see also 39 C.F.R. § 965.11. The Administrative Judge addressed the question of "how mail addressed to Eagle Forum at P.O. Box 618 and 322 State Street should be delivered" (Initial Dec. at 6), and eventually concluded that "Eagle Forum—and not Eagle Trust [Fund] or Eagle Forum Education and Legal Defense Fund—should control delivery of mail addressed to

Eagle Forum" (*id.* at 8).³ In so finding, the Administrative Judge analyzed

two key concepts First, as it applies to all mail disputes, the sender's intent is paramount. Second, when a mail dispute concerns how mail to an organization should be delivered, the mail must be delivered under the order of the organization's president or equivalent official.

(Id. at 7 (internal citations omitted).)

As to the question of the sender's intent, the Administrative Judge found that "[t]he parties agree that [the disputed] mail addressed to Eagle Forum can actually be intended for any of Mrs. Schlafly's organizations, including Eagle Trust [Fund], Eagle Forum, and Eagle Forum Education and Legal Defense Fund[.]" (*Id.*) "Because of th[e] complex organizational web [of Eagle-themed organizations receiving mail at the same address], the sender's intent for items addressed to Eagle Forum is difficult, if not impossible, to determine." (*Id.* at 7–8.) Thus, the Administrative Judge concluded that it "becomes necessary to look elsewhere for the evidence necessary to decide how the mail should be delivered." (*Id.* at 8.)

Turning to the second component of his inquiry, the Administrative Judge found that "there is no dispute that Eunie Smith is currently the acting president of Eagle Forum, entitling her to direct delivery of mail

The Administrative Judge declined to resolve the question of "who has the right to access and control P.O. Box 618," because he determined that he had "no authority to decide who owns or controls" a P.O. Box. (See Initial Dec. at 6.)

addressed to Eagle Forum." (Id.) Although John Schlafly had argued that "Eagle Forum really means Eagle Trust [Fund] or Eagle Forum Education and Legal Defense Fund[,]" and that "the term Eagle Forum encompasses the entire Schlafly network, all of which falls under Eagle [Fund,]" the Administrative concluded that "[t]hese arguments fail because the Domestic Mail Manual, which sets out the procedures for mail delivery by the Postal Service, provides that an addressee controls the delivery of its mail, and that in the absence of a order the mail is delivered contrary addressed." (Id. (emphasis omitted) (citation omitted).) "To allow either [ETF or EFE-LDF] to control delivery of mail addressed to Eagle Forum would conflict with the plain meaning" of USPS regulations. (Id. at 8–9); see also 39 C.F.R. § 211.2(a)(2) (establishing that "[t]he regulations of the Postal Service consist of[,]" among other things, "[t]he Mailing Standards of the United States Postal Service, Domestic Mail Manual"). Administrative Judge therefore determined that "all mail being held, or hereafter received, addressed to Eagle Forum at both P.O. Box 618, Alton, Illinois, and 322 State Street, Suite 301, Alton, Illinois, [should] be delivered as directed by Eunie Smith, the acting president of Eagle Forum." (Initial Dec. at 9.) John Schlafly appealed the Administrative Judge's decision, see 39 C.F.R.§ 965.12, and a Judicial Officer ("JO") affirmed. (See Postal Service Decision ("Dec. on Appeal"), Ex. B. to Defs.' Mot. to Dismiss, ECF No. 17-2, at 5 (concluding that, "[a]s the only mail here in dispute is that directed to Eagle Forum (or Eagle Forum, Attention: Phyllis Schlafly), and Eagle Forum has moved, it remains entitled to redirect such mail to its present address").) John Schlafly argued "that the addressee in question— Eagle Forum—'may not file a change-of-address order' under [section 507.2.1.5 of the Domestic Mail Manual] because the disputed mail was 'originally addressed to the addressee *at* an organization, business, place of employment, or other affiliation" (*id.* at 4 (emphasis added))⁴; however, the JO reasoned that

[b]y its own terms, the word 'addressee' in [section] 507.2.1.5 means 'an individual or a business entity,' not a combination of an individual or business entity to whom the mail piece is directed and the address to which it is directed. Indeed, [section] 507.2.1.5 deals with a situation in which mail is sent to 'an organization, business, place of employment, or other affiliation' at which the individual or business entity to whom it is directed (the addressee) no longer conducts business or is employed. That is why the second sentence of [the provision] then allows the organization or

Section 507.2.1.5 states in relevant part "A change-of-address order cannot be filed or is restricted for the following: . . . An addressee (e.g., an individual or a business entity or other organization) may not file a change-of-address order for mail originally addressed to the addressee at an organization, business, place of employment, or other affiliation. The organization or business may change the address (but not the addressee's name) on a mailpiece to redirect it to the addressee." Domestic Mail Manual § 507.2.1.5, https://pe.usps.com/cpim/ftp/manuals/dmm300/507.pdf.

business entity currently located at the physical address written on the piece of mail to 'change the address (but not the addressee's name)' on that mail to allow it to be redirected to the addressee (that is, to the individual or business entity whose name appears on that piece of mail but who no longer is located at that physical address).

(Id. (emphasis in original).)

The JO continued: "[h]ere, the mail in dispute is being sent to Eagle Forum at a physical address (P.O. Box 618 and 322 State Street), not to Eagle Forum at Eagle Trust Fund or another of the many organizations and business entities also located at that physical address." (Id. (emphasis in original).) Thus, the JO determined that the Domestic Mail Manual provision that Schlafly sought to use to reverse the Administrative Judge's underlying decision "does not apply and does not prohibit the change of address sought by Eagle Forum." (Id.; see also id. at 5 (clarifying that "[u]nless the face of a piece of disputed mail indicates that it is directed to Eagle Forum and to another business entity, for purposes of these mail delivery addressee is regulations. only one involved" (emphasis in original)).) In short, the JO determined that, "if the words on a piece of mail identify only Eagle Forum, Eagle Forum is the addressee which is allowed to control delivery of that mail." (Id.) Consequently, the JO denied Schlafly's appeal, and the JO's "final order [became] the final agency decision[.]" 39 C.F.R. § 965.12.

B. PROCEDURAL HISTORY

Seeking to reverse the JO's decision upholding USPS's mail-routing determination, Plaintiffs filed a complaint with this Court on November 13, 2017. Compl., ECF No. 1, 9 $1.)^{5}$ subsequently filed a four-count amended complaint, in which they claim (1) that USPS failed to use "reasoned decisionmaking" when resolving the underlying mail dispute (see Am. Compl. ¶¶ 52–57, 58-60 (Counts I and II)); (2) that USPS failed to follow its own regulations (see id. ¶¶ 61–67 (Count and (3) that USPS violated Plaintiffs' constitutional right to due process (see id.¶¶ 68–71 (Count IV)) by "failing to provide for reconsideration, based on after-arising grounds or evidence" (id. ¶ 69). The instant pending motion is USPS's motion to dismiss Plaintiffs' amended complaint. (See Defs.' Mot.).

USPS's motion makes several arguments. First, USPS maintains that this Court lacks subject matter jurisdiction over Plaintiffs' claims. (See Defs.' Mot. at 12–21); see also Fed. R. Civ. P. 12(b)(1). Next, USPS asserts that Plaintiffs' amended complaint fails to state a claim within the

In addition to USPS and Postmaster General Megan J. Brennan (collectively, "Defendants" or "USPS"), the original complaint also named Eagle Forum as a defendant. (See Compl. at 1.) Eagle Forum filed a motion to dismiss on the ground that venue was improper (see Mot. to Dismiss or Transfer Venue, ECF No. 10), and USPS filed a separate motion to dismiss (see Defs.' Mot. to Dismiss, ECF No. 17). The Court issued an order dismissing Eagle Forum from the action and allowing Plaintiffs to amend their complaint. (See Order, ECF No. 19, at 2–3.) It subsequently denied USPS's motion to dismiss as moot. (See Min. Order of Feb. 7, 2018.)

meaning of Federal Rule of Civil Procedure 12(b)(6), because it does not identify a source of law that authorizes this Court to grant the relief Plaintiffs request. (See id. at 22–25); see also Fed. R. Civ. P. 12(b)(6). Finally, USPS contends that Plaintiffs' complaint lacks sufficient facts to support a plausible claim that the agency violated the Constitution's guarantee of due process, as Plaintiffs have neither "identif[ied] a protected property or liberty interest under the Fifth Amendment[,]" nor "show[n] that [USPS's] procedures for resolving mail disputes violate[] the Fifth Amendment's guarantee of due process." (Defs.' Mot. at 12.)

Plaintiffs oppose USPS's dismissal motion on several fronts. They argue, first, that the APA authorizes review of USPS mail disputes. (See Pls.' Mem. in Supp. of Opp'n to Fed. Defs.' Mot. to Dismiss ("Pls.' Opp'n"), ECF No. 22-2, at 21; but see Am. Compl. ¶ 17 (appearing to acknowledge that that "Congress has exempted [USPS] from the [APA]").) Plaintiffs further argue that the Court is authorized to engage in non-statutory ("ultra vires") review of USPS's actions (see Pls.' Opp'n at 22), and that the Due Process Clause requires the agency to provide with the ability aggrieved parties reconsideration of USPS decisions based on afterarising grounds or evidence (see id. at 37–38).

For the reasons explained below, this Court concludes that, while Defendants' jurisdictional argument is misguided, Plaintiffs' amended complaint does not state a claim upon which relief can be granted because it fails to identify a cause of action that would permit the Court to grant the requested relief. Furthermore, the complaint's allegations of fact, even if true, do not support a

plausible claim that USPS violated Plaintiffs' procedural due process rights. Therefore, Defendants' motion must be granted, and Plaintiffs' claims must be dismissed pursuant to Rule 12(b)(6).

II. APPLICABLE LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes a party to move to dismiss a complaint on the grounds that the complaint "fail[s] to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). To survive such a motion, the complaint "must contain sufficient factual matter" to "state a claim to relief that is plausible on its face." Ashcroft v. Igbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Significantly for present purposes, a plaintiff who fails to show that the law authorizes him to bring his lawsuit fails to state a claim upon which relief can be granted. See Sacks v. Reynolds Sec., Inc., 593 F.2d 1234, 1239 (D.C. Cir. 1978) (explaining that where a complaint does not "sufficiently establish[] a federal cause of action[,]" the "correct motion for dismissal" is that "made pursuant to Rule 12(b)(6)"); Blake v. FBI, 298 F. Supp. 3d 77, 78 (D.D.C. 2018) ("The existence of a private right of action under federal law goes to whether the plaintiff has stated a claim on which relief can be granted."). In other words, to plead a viable claim, a plaintiff must point to a federal statute or other basis of authority that allows him to seek the relief he requests. See, e.g., El Paso Natural Gas Co. v. United States, 750 F.3d 863, 887-88 (D.C. Cir. 2014) (affirming district court's dismissal on alternative ground that claim failed to identify cause of action and thus had to be dismissed

pursuant to Rule 12(b)(6)); Citizens for Responsibility and Ethics in Washington v. Trump, 302 F. Supp. 3d 127, 133 (D.D.C. 2018) (dismissing claims pursuant to Rule 12(b)(6) where plaintiffs "lack[ed] a cause of action for its first three counts"). Moreover, it is axiomatic that "[t]o state a claim for the denial of procedural due process, a plaintiff must allege that the government deprived her of a "liberty or property interest" to which she had a "legitimate claim of entitlement," and that "the procedures attendant that deprivation upon were [in]sufficient."" constitutionally New VisionPhotography Program, Inc. v. District of Columbia, 54 F. Supp. 3d 12, 28 (D.D.C. 2014) (quoting *Roberts* v. United States, 741 F.3d 152, 161 (D.C.Cir.2014)) (second alteration in original); see also id. at 31–32 (assuming that plaintiff alleged deprivation of protected interest but dismissing complaint because it failed to allege that the attendant procedures were inadequate); Brown v. McHugh, 972 F. Supp. 58, 67 (D.D.C. 2013) (concluding that plaintiff failed to identify a protected liberty or property interest and dismissing case).

A court evaluating a Rule 12(b)(6) motion to dismiss "generally does not consider matters beyond the pleadings[,]" but the court "may consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, or documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *R.J. Reynolds Tobacco Co. v. U.S.D.A.*, 130 F. Supp. 3d 356, 369–70 (D.D.C. 2015) (internal quotation marks, citations, and alteration omitted). "The

[C]ourt must view the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 133 (D.D.C. 2013). "Although 'detailed factual allegations' are not necessary to withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim, a plaintiff must furnish 'more than labels and conclusions' or 'a formulaic recitation of the elements of a cause of action." *Id.* (quoting *Twombly*, 550 U.S. at 555).

III. ANALYSIS

USPS has requested dismissal of the first three counts of Plaintiffs' amended complaint under Federal Rule of Civil Procedure 12(b)(1), for lack of subject-matter jurisdiction, and also under Rule 12(b)(6), for failure to state a claim. (See Defs.' Mot. at 1.) Notably, the crux of USPS's argument with respect to both contentions relies on same purported defect in Plaintiffs' complaint: that Plaintiffs have failed to identify a source of authorizing the Court to review underlying USPS decision and grant Plaintiffs' requested relief. (Compare Defs.' Mot. at 12 ("[USPS's] decision is not reviewable under the APA or 'non-statutory' agency review. Therefore, this Court lacks subject matter jurisdiction to decide such claims.") with id. ("[S]uch Counts must also be dismissed for failure to state a claim under Rule 12(b)(6) because no cause of action exists to [USPS's] decision.").) review Asacknowledges (see Defs.' Mot. at 22 n.10), no less an authority than the Supreme Court has determined that whether or not a complaint identifies a cause of action pursuant to which a plaintiff can seek relief is not a question of whether the court has jurisdiction to hear the case. See Air Courier Conf. of America v. American Postal Workers Union AFL-CIO, 498 U.S. 517, 523 n.3 (1991); Bell v. Hood, 327 U.S. 678, 682 (1946) ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."). As such, the Court will treat USPS's motion exclusively as a motion to dismiss for failure to state a claim. See Fed. R. Civ. P. 12(b)(6).

This motion must be granted for the reasons laid out below. In short, Plaintiffs' amended complaint does not identify a cause of action either for its claim that USPS failed to engage in reasoned decision making when resolving the change-of-address dispute (Counts I and II), or for its contention that the agency failed to follow its own regulations (Count III). Moreover, the amended complaint fails to allege any facts that, if true, would give rise to a reasonable inference that USPS violated Plaintiffs' constitutional right to due process (Count IV).

A. PLAINTIFFS HAVE NOT IDENTIFIED A CAUSE OF ACTION UNDER EXISTING LAW

1. There Is No APA Review Of USPS Decisions

Ordinarily, when no other adequate legal remedy exists, the APA authorizes the claims against an agency in federal court. See 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy

in a court are subject to judicial review."); see also Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) ("The [APA], which governs the proceedings of administrative agencies related judicial review, establishes a scheme of decisionmaking." (quoting 'reasoned Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983))). However, Congress has expressly exempted USPS actions from review under the APA, with limited exceptions. See 39 U.S.C. § 410(a) (stating that, with certain exceptions, "no Federal law dealing with public or Federal contracts, property, works, officers, budgets, or funds, including employees, provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service"): see also Mittleman v. Postal Regulatory Comm'n, 757 F.3d 300, 305 (D.C. Cir. 2014) ("[T]he Postal Service is exempt from review under the [APA]." (internal quotation marks and citations omitted)). The D.C. Circuit has established that "non-statutory" review may be available "for certain Postal Service decisions, notwithstanding the preclusion of APA review under 39 U.S.C. § 410(a)." Mittleman, 757 F.3d at 307. But that review is limited: "It is available only to determine whether the agency has acted ultra vires—that is, whether it has exceeded its statutory authority." Id. (internal quotation marks and citations omitted).

This all means that the claims in Plaintiffs' amended complaint that request that USPS's decision be reversed by this Court because USPS failed to engage in "reasoned decisionmaking" concerning the change-of-address dispute and thus that the agency's decision should be reversed by this Court (see, e.g.,

Am. Compl. ¶ 57) seek relief that is not authorized by law. To be sure, Plaintiffs have taken care not to cite the APA specifically in the text of their amended complaint, but their core contention that "USPS's administrative order fails to meet the standard for decisionmaking reasoned and is arbitrary, capricious, an abuse of discretion[and] not otherwise in accordance with the law" (Id. ¶¶ 57, 60) is unmistakably rooted in the APA's primary provisions (see 5 U.S.C. § 706(2)), such that Counts I and II unquestionably rely upon the unavailable cause of action that the APA establishes. Cf. Kivanc v. Ramsey, 407 F. Supp. 2d 270, 277 (D.D.C. 2006) ("The Court is 'not bound by plaintiff's characterization of the action,' and may examine whether plaintiff is actually pleading a [different] claim." (quoting Maddox v. Bano, 422 A.2d 763, 765 (D.C. 1980)).

Plaintiffs have no good answer to the charge that they are seeking to invoke a cause of action that Congress has specifically removed from the arsenal available to plaintiffs who are aggrieved by USPS determinations. (See Defs.' Mot. at 13.) Instead, despite section 410(a), Plaintiffs breezily maintain "that APA review [still] applies," that "USPS's partial APA exemption does not preclude traditional forms of pre-APA equitable review," and that "judicial review would exist here even if Congress had intended § 410(a) to preclude judicial review." (Pls.' Opp'n at 20 (emphasis in original).)

None of these contentions is persuasive. First of all, the suggestion that the express statutory exemption in section 410(a) of Title 39 of the United States Code is too narrow to pertain to

claims arising in the context of the instant mail dispute (see id. at 21) fails because the D.C. Circuit has long considered that statutory provision to be a broad exemption that shields USPS determinations from the auspices of APA review, see, e.g., Mittleman, 757 F.3d at 305 (reemphasizing in the context of analyzing whether judicial review of USPS decisions to close post offices is precluded that "we have observed that the Postal Service is exempt from review under the Administrative Procedure Act" (internal quotation marks and citation omitted)). Plaintiffs' second argument—that the APA should be set aside entirely, and the Court should permit plaintiffs to rely on "traditional forms of pre-APA equitable review" (Pls.' Opp'n at 20 (emphasis in original))—ignores the fact that Congress has specifically enacted a statute to provide a catch-all cause of action for plaintiffs who seek to decisionmaking challenge agency where otherwise exists (i.e., the APA), and where Congress has further acted to preclude even APA review, it is well established that no cause of action remains, much less some undefined "traditional" equitable remedy, see Carlin v. McKean, 823 F.2d 620, 623 (D.C. Cir. 1987) (explaining that, while "the presumption of reviewability was a firmly rooted principle of administrative law even before the APA was enacted[,] . . . courts should [not] continue to indulge a presumption of reviewability under the old administrative law principles when Congress has explicitly exempted an agency from the APA's coverage" (internal citations omitted)). Plaintiffs struggle valiantly to establish that something akin to "non-APA review in equity" exists (Pls.' Opp'n at 22) and can be the basis for their claims against USPS

(see id. at 22–30), but this assertion finds no support in law or in logic, and the mere suggestion plainly defies the statutory scheme for administrative review that Congress has carefully crafted.

Plaintiffs' third, and final, contention is also easily rejected. Based on inferences drawn from Leedom v. Kyne, 358 U.S. 184 (1958), and Board of Governors of the Fed. Reserve System v. MCorp Financial, 502 U.S. 32 (1991), Plaintiffs insist that "due process provides forms of review even in the face of statutes that deny review." (Pls.' Opp'n. at 31.) But these precedents do not support that proposition. For one, neither case mentions "due process." Rather, Kyne stands for the proposition even where Congress has statutorily precluded review of agency decisions, a plaintiff may still bring a lawsuit challenging agency actions "in excess of its delegated powers and contrary to a specific prohibition in" a statute. Kyne, 358 U.S. at 188. That is to say, ultra vires may still be available. In MCorp Financial, the Supreme Court distinguished Kyne because statute in *MCorp* Financial"expressly provide[d] MCorp with a meaningful and adequate opportunity for judicial review[.]" MCorp Financial, 502 U.S. at 43. Plaintiffs concede that MCorp Financial thus has no independent "relevance here[,]" but they interpret the two cases together as meaning that even if the APA precludes judicial review of USPS decisions, "review would nonetheless be available under *Kyne* for want of any other forum to review USPS's action." (Pls.' Opp'n at 31.) It is true that "central to [the Supreme Court's] decision in Kyne was the fact that the Board's interpretation of the Act would wholly deprive

the union of a meaningful and adequate means of vindicating its statutory rights[,]" as the Supreme Court explained in *MCorp Financial*. 502 U.S. at 43. But this does not mean that the Supreme Court opened up any and all agency actions to judicial review; rather, as stated above, the Court recognized that *ultra vires* review of agency action may be available in certain situations, even if Congress otherwise intended to preclude judicial review.

The bottom line is this: nothing that Plaintiffs assert in the context of their opposition to Defendants' motion to dismiss Counts I and II persuasively demonstrates that either the APA or some other form of pre-APA equitable relief is available as a cause of action for the claims that Plaintiffs bring here. Furthermore, Plaintiffs have done nothing to support their corollary contention that this Court can review these claims because the USPS has acted "ultra vires" with respect to its resolution of the mail delivery dispute (see Am. Compl. ¶¶ 57, 60; see also Pls.' Opp'n at 28), as explained below.

2. Plaintiffs Have Not Demonstrated Ultra Vires Action On The Part Of USPS

Where APA review is precluded and no other statutory basis for challenging USPS's determination regarding mail delivery exists, the only plausible cause of action that Plaintiffs could theoretically have against the USPS under the instant circumstances is an *ultra vires* claim—*i.e.*, a claim that USPS acted outside of the authority granted to it by Congress. *See Mittleman*, 757 F.3d at 307. But the complaint at issue here contains *no* allegations of fact that would support a finding

that USPS acted ultra vires. Indeed, the D.C. Circuit has previously considered the scope of *ultra* vires review as far as USPS decisionmaking is concerned, and has determined that it includes only review of the agency's position regarding "(1) a straightforward question of statutory interpretation; (2) a question concerning whether a regulation in the [Domestic Mail] Manual was a valid exercise of USPS's authority; and (3) a question focusing on whether a Postal Service decision was supported by agency's contemporaneous justification instead, reflected counsel's post hoc rationalization." Sears, Roebuck & Co. v. USPS, 844 F.3d 260, 265 (D.C. Cir. 2016) (internal quotation marks and citations omitted). None of the allegations contained in Plaintiffs' amended complaint involves any of these issues, and in no other way do Plaintiffs identify a grant of statutory authority that USPS's actions exceeded. (See generally, Am. Compl.)

Plaintiffs instead appear to assert that USPS used flawed reasoning in coming to its decision regarding the mail delivery dispute at issue here and, by doing so, acted ultra vires. (See id. ¶¶ 53– 56; 59; Pls.' Opp'n at 30.) But this patently misunderstands the nature of valid ultra vires claims. See Adamski v. McHugh, 304 F. Supp. 3d 227, 237 (D.D.C. 2015) ("[An] ultra vires claim derives from the contention that the agency has acted without the *authority* to do so, and it is based on the inherent power of the federal courts 'to reestablish the limits on [executive] authority' through judicial review." (quoting Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988)) (second alteration in original) (emphasis added)); see also Griffith v. Fed. Labor Relations Auth., 842 F.2d 487,

492 (D.C. Cir. 1988) ("Even where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction."). Stated simply, a claim that an agency acted *ultra vires* is a claim that the agency acted "in excess of its delegated powers and contrary to a specific prohibition in [an] Act[,]" *Kyne*, 358 U.S. at 188, not that an agency's authorized action was imprudent or that, in validly exercising its judgment, the agency reached the wrong result.

Here, Congress has plainly authorized USPS to resolve disputes between parties regarding mail delivery. See 39 U.S.C. § 401 (establishing that the "General powers of USPS" include the power "to adopt, amend, and repeal such rules and regulations . . . as may be necessary in the execution of its functions . . . [and] to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers"); see also 39 U.S.C. § 204 (creating the "Judicial Officer" position, which "shall perform such quasi-judicial duties . . . as the Postmaster General may designate"). And, notably, Plaintiffs' amended complaint does not contend otherwise. Moreover, Plaintiffs have failed to point to any federal statute that dictates the reasoning that USPS must use in mail-dispute proceedings. In fact, explained above. Congress has expressly exempted those USPS decisions that are issued in the context of mail-dispute proceedings from judicial review under the APA, i.e., from review of whether the decisions are reasonable. See 39 U.S.C. § 410(a); see also Mittleman, 757 F.3d at 305. Thus, it is clear

to this Court that Plaintiffs' contention that USPS's alleged lack of reasoned decisionmaking constituted *ultra vires* action on the part of the agency is not a plausible claim.⁶

3. Plaintiffs Have Not Identified A Statute Or Regulation That Authorizes Federal Courts To Require USPS To Adhere To Its Own Regulations

In Count III of the complaint, Plaintiffs pivot from the 'lack of reasoned decisionmaking' contention and attempt to challenge USPS's alleged "failure to follow [USPS's] prohibition on splitting mail addressed to post office boxes[.]" (Am. Compl. at 15.) However, just as with the claims in Counts I and II, Plaintiffs have not identified a source of law that authorizes the Court to review any such agency violation and grant the relief Plaintiffs seek here. In other words, Plaintiffs have not pointed to any cause of action that authorizes the Court to force USPS to follow its own rules.

In their opposition brief, Plaintiffs assert that, "because USPS's position would violate [various] constitutional provisions, the claims that Plaintiffs raise indeed are 'ultra vires' claims in the manner that USPS uses that term[.]" (Pls.' Opp'n at 28; see also id. (maintaining that USPS has acted ultra vires because, "[e]ven if USPS followed the laws of Congress as USPS understands those laws, that would not insulate USPS from review based on the unconstitutionality of USPS's interpretation of those laws")). Such a confused 'hail Mary' contention does not warrant a prolonged response. Simply put, a plausible ultra vires claim pertains solely to the assertion that an agency has transgressed the will of Congress, not that its actions constitute a constitutional violation.

To be sure, Congress has authorized USPS to *issue* regulations. *See* 39 U.S.C. § 401(2). And USPS has, pursuant to that authority, promulgated various regulations governing its own actions, including, for example, Postal Operations Manual § 841.751—the regulation that Plaintiffs contend USPS "fail[ed] to follow[.]" (Am. Compl. ¶ 66); *see also* 39 C.F.R. § 211.2(a)(2) (identifying "the Postal Operations Manual" as one of "[t]he regulations of the Postal Service"). But even if the Court takes as true Plaintiffs' contention that USPS failed to follow its own directives, Plaintiffs have identified no source of law that would allow this Court to require USPS to go back and conform its actions to the rules that govern the agency's conduct.

This is not to say that an agency is free to disregard its own regulations. Cf. Friedler v. GSA, 271 F. Supp. 3d 40, 61 (D.D.C. 2017) (calling it "clear beyond cavil that 'an agency is bound by its own regulations") (quoting Nat'l Envt. Dev. Ass'n's Clean Air Project v. EPA, 752 F.3d 999, 1009 (D.C. Cir. 2014)). Indeed, in the ordinary case, the APA would provide the legal vehicle for a plaintiff to contend that an agency has violated applicable regulations, and the Court would be authorized to vacate any agency action that transgresses the agency's own prescriptions pursuant to that statute. See 5 U.S.C. § 706(2)(A); see also Auer v. Robbins, 519 U.S. 452, 459 (1997); Policy & Research, LLC v. U.S. Dep't of Health & Human Servs., 313 F. Supp. 3d 62, 72 (D.D.C. 2018). But as has by now been stated repeatedly, it is well-settled law that APA review does not apply to USPS determinations. See Mittleman, 757 F.3d at 307. And Plaintiffs' failure to point to any cause of action outside the APA that would allow the Court to enjoin USPS to follow its own regulations means that their request for relief based on USPS's alleged failure to abide by its own regulations (Count III) must be dismissed.

B. PLAINTIFFS HAVE NOT ALLEGED FACTS THAT, IF TRUE, WOULD STATE A PLAUSIBLE CLAIM THAT USPS VIOLATED PLAINTIFFS' FIFTH AMENDMENT RIGHT TO DUE PROCESS

In Count IV of their amended complaint, Plaintiffs "USPS's administrative contend that provisions violate due process" because they do not "provide for reconsideration, based on after-arising grounds or evidence." (Am. Compl. ¶ 69.) Thus, the amended complaint appears to attempt to make out a claim that USPS violated Plaintiffs' procedural due process rights, in violation of the Fifth Amendment. See U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"). Presumably because Plaintiffs seek only declaratory and injunctive relief, and "[t]here is no question that a cause of action may be stated under the procedural due process component of the fifth amendment for equitable relief[,]" Harper v. Blumenthal, 478 F. Supp. 176, 187 n.10 (D.D.C. 1979), USPS does not seek dismissal of Plaintiffs' due process claim on the same grounds as their other claims.

Instead, USPS argues that "Plaintiffs fail to identify any constitutionally protected interest of which the Postal Service's procedures deprived them" and that the procedures that USPS affords to aggrieved parties—including representation by counsel, the opportunity to present evidence and argument, and the ability to appeal— "more than comply with the Constitution's guarantee of due process." (Defs.' Mot. at 24–25.)

To assess the sufficiency of the complaint's Fifth Amendment due process claim on the grounds that Defendants' motion raises, this Court must "apply a familiar two-part inquiry": it must determine whether the facts alleged, if true, would establish (1) that "plaintiffs were deprived of a protected interest, and, if so," (2) that they failed to "receive [] the process they were due." Barkley v. U.S. Marshals Serv. Ex Rel. Hylton, 766 F.3d 25, 31 (D.C. Cir. 2014) (internal quotation marks and citation omitted). This task is easily accomplished here, for even if the Court assumes (without deciding) that allegations of the amended complaint suffice to establish that USPS deprived Plaintiffs of a protected property interest in the disputed mail which is now being sent to Eagle Forum's new address rather than to the P.O. Box and street address at which ETF and EFE-LDF receive mail— Plaintiffs' amended complaint alleges no facts supporting their contention that they did not receive "the process they were due." *Id.*; (see generally Am. Compl.) Indeed, it is well established that due process requires that the deprivation of a constitutionally protected interest must preceded by notice and opportunity for hearing appropriate to the nature of the case." Id. (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). Moreover, a plaintiff

Plaintiffs do not claim that they received inadequate notice. (See Am. Compl ¶¶ 68–71.)

is not "entitled to perfect procedures or the procedures of his choice." *Bagenstose v. District of Columbia*, 503 F. Supp. 2d 247, 257 (D.D.C. 2007). Notably, and as relevant here, "procedural due process in an administrative hearing does not always require all of the protections afforded a party in a judicial trial." *Beverly Enters., Inc. v. Herman*, 130 F. Supp. 2d 1, 18 (D.D.C. 2000).

It is clear to this Court that Plaintiffs have come nowhere near to alleging facts that would support a plausible claim that USPS violated their procedural due process rights. First, the amended complaint contains no facts to support Plaintiffs' claim that USPS actually refused to provide for reconsideration of the JO's decision based on after-arising grounds or evidence, or otherwise. (See generally Am. Compl.; see also Defs.' Mot. at 24 (claiming that Plaintiffs never asked the Judicial Officer reconsideration" (emphasis altered)).) One would expect a plaintiff who seeks to challenge an agency's refusal to provide a certain procedure to allege facts that, if proven, would establish the agency's refusal. And the mere fact that the agency regulations do not specifically afford such a procedure (see Am. Compl. at 7) says nothing about whether the agency would have accommodated such a request under the circumstances presented here. See Reno v. Flores, 507 U.S. 292, 301 (1993) (explaining that "[t]o prevail in such a facial challenge, respondents 'must establish that no set of circumstances exists under which the [regulation] would be valid" (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (second alteration in original)). This Court will not assume that USPS would never allow for reconsideration simply because

its regulations do not say otherwise. *Cf. id.* at 309 (refusing to "assume, on this facial challenge, that an excessive delay will invariably ensue" where "there is no evidence of such delay" and where "[r]espondents point out that the regulations do not set a time period within which the immigration-judge hearing, if requested, must be held").

Even if it sufficed for Plaintiffs to point to the absence of a reconsideration provision in the agency's regulations, it is clear that the Due Process Clause does not mandate any such process. Plaintiffs have not cited any case that states that the failure of an agency to provide reconsideration after appeal is a due process violation. Moreover, in similar cases, courts have easily found the due process requirements of the Constitution to be satisfied where various procedures short of reconsideration are afforded to the parties as part of an administrative review process. See, e.g., Barkley, 766 F.3d at 32-33 (finding due process requirements met where officer "terminated for reasons of medical fitness" was first "given the opportunity to supply" evidence to "neutral decisionmakers[,]" even though no oral hearing was held); Beverly Enters., 130 F. Supp. 2d at 19 (finding due process requirements met in administrative proceedings where "the plaintiff employed counsel, took depositions from and cross examined" witnesses, and "reviewed all documents considered by the agency in its decision and presented its own exhibits and witnesses to prove its case"); id. (citing case in which "the court held that an administrative hearing meets the main requirements of due process where a party had the right to a neutral arbitrator, to be represented by counsel, to conduct crossexamination, present evidence and witnesses on its own behalf and rebut evidence submitted by the adverse party").

In short, Plaintiffs' claim that USPS violated their constitutional right to due process clearly cannot survive USPS's motion to dismiss when Plaintiffs offer no facts to suggest that the requested procedure was ever denied, and even so, merely claim, without more, that due process requires that USPS "provide for reconsideration." (Am. Compl. ¶ 69.)

IV. CONCLUSION

For the reasons stated above, Plaintiffs have failed to identify a cause of action that would authorize this Court to grant the relief they seek as to three of the counts in their amended complaint, and have also failed to allege facts that support a claim that Defendants violated their constitutional right to due process. Thus, Plaintiffs' amended complaint "fail[s] to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). Accordingly, and as set forth in the accompanying Order, Defendant's motion to dismiss is **GRANTED**, and Plaintiffs' action is **DISMISSED**.

DATE: February 4, 2019 /s/ KETANJI BROWN JACKSON United States District Judge From: DCD_ECFNotice@dcd.uscourts.gov

Sent: Wednesday, March 6, 2019 3:33 PM

To: DCD_ECFNotice@dcd.uscourts.gov

Subject: Activity in Case 1:17-cv-02450-KBJ

EAGLE TRUST FUND et al v. U.S. POSTAL SERVICE et al Order on

Motion to Alter Judgment

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U.S. District Court District of Columbia

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Case Name: EAGLE TRUST FUND et al v.

U.S. POSTAL SERVICE et al

Case Number: 1:17-cv-02450-KBJ

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Docket Text:

MINUTE ORDER. Pending before the Court is Plaintiffs [28] Motion to Alter Judgment, which they bring pursuant to Federal Rule of Civil Procedure 59(e). (See Pls. Mot. to Alter Judg., ECF No. 28, at 1.) Plaintiffs maintain that the Court should vacate its dismissal order because section 410(a) of Title 39 of the United States Code is unconstitutional insofar as this Court has interpreted it to bar review of United States Postal Service (USPS) mail-dispute decisions (see Pls. Mem. in Supp. of Mot. to Alter Judg., ECF No. 28-1, at 4, 6); but, [a] Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice[,] Firestone v. Firestone, F.3d 1205,1208 (D.C.Cir.1996) (internal quotation marks and citation omitted). Plaintiffs raised the same argument in their prior briefing (see Pls. Oppn to Def.s Mot. to Dismiss, ECF No. 22-2, at 28 (arguing that USPSs vision of unfettered power both to devise and to enforce postal policies even arbitrarilywould violate separation principles, which go to Plaintiffs liberty interests)), and they have cited no change in law, new evidence, clear error, or other circumstance that would persuade the Court to revisit its judgment in light of this recycled contention. Therefore, Plaintiffs [28] motion is hereby DENIED. Signed by Judge Ketanji Brown Jackson on 3/6/2019. (lckbj2)

1:17-cv-02450-KBJ Notice has been electronically mailed to:

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United States Court of Appeals for the District of Columbia Circuit

No. 19-5090

September Term, 2019 1:17-cv-02450-KBJ

Filed On: August 28, 2020

Eagle Trust Fund, et al.,

Appellants

v.

United States Postal Service and Megan J. Brennan, in her official capacity as Postmaster General,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Silberman, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s

Michael C. McGrail

Deputy Clerk

38a



JUDICIAL OFFICER

2101 Wilson Boulevard Suite 600 Arlington Va 22201-3078 703-812-1900

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In the Matter of a Mail Dispute Between

EAGLE FORUM and

JOHN SCHLAFLY & BRUCE SCHLAFLY

September 15, 2017

P.S. Docket No. MD 17-13

NOTICE OF RIGHT TO APPEAL

The attached Initial Decision may be appealed to the Judicial Officer of the Postal Service within ten (10) days from the date of receipt of the Initial Decision. A Notice of Appeal containing a detailed explanation of the grounds for the appeal may be filed electronically at https://uspsjoe.justware.com/JusticeWeb or with the Recorder, United States Postal Service, Suite 600, 2101 Wilson Boulevard, Arlington, VA 22201-3078 (see 39 C.F.R. § 965.12).

If no appeal is taken within the prescribed time, the Initial Decision will become final unless the Judicial Officer elects to review the decision on his own initiative.

/s/

Alan R. Caramella Administrative Judge



JUDICIAL OFFICER

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In the Matter of a Mail Dispute Between

EAGLE FORUM

and

JOHN SCHLAFLY & BRUCE SCHLAFLY

September 15, 2017

P.S. Docket No. MD 17-13

APPEARANCE FOR EAGLE FORUM:

Jessica Powers, Esq. Smith Amundsen LLC

James P. Sanders, Esq.

APPEARANCE FOR JOHN AND BRUCE

Edward D. Greim, Esq. Andrew A. Alexander, Esq.

SCHLAFLY: Graves Garrett, LLC

INITIAL DECISION

The parties to this mail dispute each claim the right to direct delivery of mail addressed to Eagle Forum at two addresses: P.O. Box 618 and 322 State Street, Suite 301, Alton, Illinois. The parties also seek a declaration of their respective rights for access and control of P.O. Box 618. As provided for by the *Postal* Operations Manual (POM) Section 616.21, the dispute has been referred to the Judicial Officer for a decision, and then assigned to me for an initial decision. See 39 C.F.R. Part 965. Immediately after the dispute was docketed, the Judicial Officer ordered the Alton, Illinois postmaster to hold all mail addressed to Eagle Forum at both P.O. Box 618 and 322 State Street. In February 2017, the parties agreed on a system for jointly collecting the mail addressed to both locations, and they have been following that system while they await a resolution of this dispute.

FINDINGS OF FACT

- 1. Phyllis Schlafly formed the Eagle Trust Fund (Eagle Trust) in 1967 to publish and distribute a newsletter, to do research on political science and national defense, to distribute educational materials, and to take other actions deemed necessary by the trustees (Schlafly, Exh. A). That same year, Ms. Schlafly began leasing P.O. Box 618 in Alton, Illinois (Schlafly, Exh. B).
- 2. Phyllis Schlafly set up many additional organizations during her lifetime. Most, if not all, of these organizations received mail addressed to "Phyllis Schlafly, Eagle Forum" at P.O. Box 618, including:
 - Eagle Forum Education and Legal Defense Fund (Schlafly, Exh. C at 7)
 - Eagle Forum PAC (Schlafly, Exh. C at 7)
 - Eagle Forum 501(c)(4) (Schlafly, Exh. D at 1, 2)
 - Phyllis Schlafly Report (Schlafly, Exh. D at 2)
 - Phyllis Schlafly's American Eagles (Schlafly, Exh. D at 3)
 - Eagle Trust Fund (Schlafly, Exh. D at 3)

¹ Ms. Schlafly died in September 2016 (Schlafly brief at 9).

- 3. Some of these organizations, as well as others, received mail addressed to their specific organization at P.O. Box 618, including:
 - Republican National Coalition for Life (Schlafly, Exh. C at 8; Exh. D at 15)
 - Eagle Trust Fund (Schlafly, Exh. D at 10)
 - Phyllis Schlafly Eagles (Schlafly, Exh. D at 28)
- 4. Eagle Trust provides back-office management, bookkeeping, and mail services for the other organizations (Schlafly, Exh. U at ¶ 6). Additionally, because of this complex web of organizations using the same mailing address, many of which have similar names, the organizations relied on Eagle Trust to sort the incoming mail and ensure that it was properly distributed to the correct organization (Schlafly, Exh. G; see also Schlafly brief at 8, 12).
- 5. The parties involved in this dispute are three of the many organizations started by Phyllis Schlafly:
 - Eagle Trust, whose current trustees are two of Ms. Schlafly's sons, John and Bruce Schlafly (Schlafly, Exh. U at ¶ 5).
 - Eagle Forum Education and Legal Defense Fund, which was incorporated as a non-profit organization in 1981 (Schlafly, Exh. O).
 - Eagle Forum, a 501(c)(4) organization, whose current acting president is Eunie Smith (Eagle Forum, Exh. A at 8).
- 6. In this dispute, Eagle Trust and Eagle Forum Education and Legal Defense Fund are aligned against Eagle Forum over the right to direct mail addressed to Eagle Forum. These parties are also at odds over access and control of P.O. Box 618. (See Joint Statement of Issues in Dispute, June 19, 2017)

- 7. As of September 2016, Ed Martin was the President of Eagle Forum and John Schlafly was the Secretary (Eagle Forum, Exh. K).
- 8. In October 2016, the Third Judicial Circuit Court in Madison County, Illinois, issued an Order suspending Edward Martin and John Schlafly from their positions with Eagle Forum. Both Mr. Martin and Mr. Schlafly were enjoined and restrained from conducting any business on behalf of Eagle Forum or holding themselves out as holding positions with Eagle Forum. (Eagle Forum, Exh. A at 8).
- 9. The court then designated Eunie Smith as the Acting President of Eagle Forum and Anne Cori as the Acting Chairman of Eagle Forum (Eagle Forum, Exh. A at 8).
- 10. In the wake of the Third Judicial Circuit's decision, Eagle Forum submitted a change of address request to the Alton postmaster asking that all mail addressed to 322 State Street be forwarded to Eagle Forum's new place of business on West 3rd Street (Schlafly, Exh. C). John and Bruce Schlafly opposed that request, leading to this dispute.

DECISION

Although the parties have several pending lawsuits against each other in state and federal court, they have identified two issues they want to resolve in this proceeding: (1) who has the right to access and control P.O. Box 618, and (2) how mail addressed to Eagle Forum at P.O. Box 618 and 322 State Street should be delivered. As discussed below, I am only authorized to resolve one of these issues.

The purpose of a mail dispute proceeding at the Judicial Officer Department is to determine which party controls the delivery of mail sent to a particular

name and address, not who owns or controls a post office box. *Postal Operations Manual* (POM) § 616; *Webb and Webb*, MD 17-53 (I.D. April 19, 2017)(citing *Oriental Shriners and Civic Partners, Inc.*, MD 13-168 (P.S.D. September 11, 2013)). Thus, although the parties have spent considerable time and effort addressing this question, I have no authority to decide who owns or controls P.O. Box 618.

As to the second issue, two key concepts must be considered in determining how mail addressed to Eagle Forum should be delivered. First, as it applies to all mail disputes, the sender's intent is paramount. Webb and Webb, MD 17-53 (P.S.D. May 10, 2017). Second, when a mail dispute concerns how mail to an organization should be delivered, the mail must be delivered under the order of the organization's president or equivalent official. Domestic Mail Manual (DMM) § 508.1.5.1; Seaman and Breunig, MD 16-215 (P.S.D. October 28, 2016). Each of these factors is discussed below.

Sender's intent

The record establishes that Mrs. Schlafly established many organizations before her death. The record also establishes that until late 2016 or early 2017, those organizations all used both P.O. Box 618 and 322 State Street to send and receive mail. Sometimes the incoming mail was addressed to a specific organization, but more often it was simply addressed to "Phyllis Schlafly, Eagle Forum." The parties agree that such mail addressed to Eagle Forum can actually be intended for any of Mrs. Schlafly's organizations, including Eagle Trust, Eagle Forum, and Eagle Forum Education and Legal Defense Fund (Schlafly brief at 2, 8; Joint Status Report and Request for Extension, March 27, 2017;

P.O. Box 618 Mail Handling Protocol, February 24, 2017). Simply put, the sender's intent often cannot be determined until after the mail is opened. Thus both before and after this dispute arose, Mrs. Schlafly's organizations developed a system to sort and distribute the incoming mail after it was opened—a system that apparently worked very well for many years, or at least until the relationship between the organizations soured in 2016. Because of this complex organizational web, the sender's intent for items addressed to Eagle Forum is difficult, if not impossible, to determine. It thus becomes necessary to look elsewhere for the evidence necessary to decide how the mail should be delivered. See e.g. Dwyer and Barlow, MD 04-82 (I.D. July 23, 2004).

President or equivalent official

Here, in light of the Illinois state court decision of October 2016, there is no dispute that Eunie Smith is currently the acting president of Eagle Forum, entitling her to direct delivery of mail addressed to Eagle Forum. The Schlaflys try to complicate this straightforward analysis by arguing that Eagle Forum really means Eagle Trust or Eagle Forum Education and Legal Defense Fund. They assert that the term Eagle Forum encompasses the entire Schlafly network, all of which falls under Eagle Trust. They also assert—without any citation to the record—that Eagle Forum Education and Legal Defense Fund is often referred to as Eagle Forum (Schlafly brief at 7).

These arguments fail because the Domestic Mail Manual, which sets out the procedures for mail delivery by the Postal Service, provides that an addressee controls the delivery of its mail, and that in the absence of a contrary order the mail is delivered as addressed. DMM § 508.1.1.1. This provision, including the term *addressee*, must be interpreted by looking at its plain language and giving consideration to its terms in accordance with their common meaning. *Seaman and Breunig*, MD 16-215 (citing *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997)).

Applying this standard to DMM § 508.1.1.1 leads to only one conclusion: Eagle Forum—and not Eagle Trust or Eagle Forum Education and Legal Defense Fund—should control delivery of mail addressed to Eagle Forum. To allow either of those other two organizations to control delivery of mail addressed to Eagle Forum would conflict with the plain meaning of DMM § 508.1.1.1.

The other arguments put forth by the John and Bruce Schlafly fail for similar reasons. For example, the fact that Eagle Trust is the oldest of Mrs. Schlafly's organizations does not negate the fact that the disputed mail in this case is not addressed to Eagle Trust. And while it is also true that Eagle Trust has traditionally received mail on behalf of many (if not all of) Mrs. Schlafly's organizations, that too does not negate the fact that the disputed mail in this case is addressed to Eagle Forum, and not any of those other organizations.

The remainder of the John and Bruce Schlafly's arguments are not relevant to the issues addressed in this decision. Instead, as noted, the other arguments focus on control of and access to P.O. Box 618. Thus, regardless of who has paid for the P.O. Box in the past, and regardless of who is currently paying for the P.O. Box, and even if Eagle Forum surrendered any claim to the P.O. Box, the fact remains that Eagle Forum is

entitled to receive mail addressed to Eagle Forum.² **RECOMMENDATION**

I recommend that the Judicial Officer issue an order to the Alton Postmaster directing that all mail being held, or hereafter received, addressed to Eagle Forum at both P. O. Box 618, Alton, Illinois, and 322 State Street, Suite 301, Alton, Illinois, be delivered as directed by Eunie Smith, the acting president of Eagle Forum.

This decision only addresses how mail addressed to Eagle Forum (or Eagle Forum, Attention: Phyllis Schlafly) at P.O. Box 618 and 322 State Street, Alton, Illinois should be delivered by the Alton Postmaster. All other mail addressed to other Schlafly organizations at either address should be delivered as addressed.

This decision does not resolve any other legal disputes between the parties. Further, it does not decide who actually owns the contents of the disputed mail. *Hoeppner and Vollstedt*, MD 08-251 (I.D. October 16, 2008). Eagle Forum must continue to work with the other Schlafly organizations to ensure that mail addressed to Eagle Forum, but intended for one of the other organizations, is promptly forwarded to that organization. Finally, if a future court order directs a different system for delivery of the mail, postal regulations provide that the mail will be delivered according to that order. POM § 616.3.

/s/

Alan R. Caramella Administrative Judge

² Because the ultimate answers to these questions are not necessary to this decision, I do not make any conclusions regarding them.



JUDICIAL OFFICER

2101 Wilson Boulevard

Suite 600

Arlington Va 22201-3078 703-812-1900

Fax: 703-812-1901

In the Matter of a Mail Dispute Between

EAGLE FORUM

and

JOHN SCHLAFLY & BRUCE SCHLAFLY

October 24, 2017

P.S. Docket No. MD 17-13

APPEARANCE FOR EAGLE FORUM:

James P. Sanders, Esq. Jessica Powers, Esq. Smith Amundsen LLC

APPEARANCE FOR JOHN AND BRUCE

Edward D. Greim, Esq. Andrew A. Alexander, Esq.

SCHLAFLY:

Graves Garrett, LLC

POSTAL SERVICE DECISION

John and Bruce Schlafly appeal a September 15, 2017 Initial Decision issued by Administrative Judge Alan R. Caramella. The Initial Decision recommended that I order the Alton, Illinois Postmaster to deliver the disputed mail as directed by Eunie Smith, president of Eagle Forum, the other party to this Mail Dispute. I affirm.¹

Neither party contests the Initial Decision's findings of fact, and this Postal Service Decision assumes familiarity with those facts.

The parties stipulated that the issue to be decided by this Mail Dispute is "How should mail addressed to "Eagle Forum at (A) P.O. Box 618, Alton, IL[¶]62002; and (B) 322 State Street, Suite 301, Alton, IL 62002 be delivered?" Much of the Schlaflys' appeal focuses on other business entities that receive mail at those locations – that focus is irrelevant to the stipulated issue before me. Mail directed to business entities other than Eagle Forum will continue to be delivered as addressed, as the Initial Decision concluded.

As to the mail that is in dispute – mail solely directed to Eagle Forum – the Initial Decision was based primarily on Domestic Mail Manual (DMM) § 508.1.1.1, which provides that "[a]ddressees may control delivery of their mail." Concluding that Eagle Forum is the addressee of mail sent to Eagle Forum at P.O. Box 618, Alton, IL [¶] 62002 and 322 State Street, Suite 301, Alton, IL 62002, the Initial Decision reasoned that Eagle Forum is permitted to forward that mail to its new business location.

The Schlaflys argue, however, that this interpretation of DMM § 508.1.1.1 conflicts with DMM § 507.2.1.5. The latter provision states in relevant part:

June 19, 2017 Joint Statement of Issues in Dispute. I see no material distinction between "Eagle Forum" and "Eagle Forum, Attention: Phyllis Schlafly." The parties treated them the same and, on appeal, the Schlaflys have not requested that mail to "Eagle Forum, Attention: Phyllis Schlafly" should be treated differently than mail to "Eagle Forum." See, e.g., Initial Decision at Finding 2, pages 5, 7; Schlaflys' appeal at 2, 13. "Eagle Forum" and its derivation are both included in this Mail Dispute.

A change-of-address order cannot be filed or is restricted for the following:

An addressee (e.g., an individual or a business entity or other organization) may not file a change-of-address order for mail originally addressed to the addressee at an organization, business, place of employment, or other affiliation. The organization or business may change the address (but not the addressee's name) on a mailpiece to redirect it to the addressee.

Specifically, the Schlaflys argue that the addressee in question – Eagle Forum – "may not file a change-of-address order" under this provision because the disputed mail was "originally addressed to the addressee at an organization, business, place of employment, or other affiliation." I see no basis for such a conclusion, which would render DMM § 508.1.1.1 meaningless in this context.

By its own terms, the word "addressee" in DMM § 507.2.1.5 means "an individual or a business entity," not a combination of an individual or business entity to whom the mail piece is directed and the address to which it is directed. DMM § 507.2.1.5 deals with a situation in which mail is sent to "an organization, business, place of employment, or other affiliation" at which the individual or business entity to whom it is directed (the addressee) no longer conducts business or is employed. That is why the second sentence of DMM § 507.2.1.5 then allows the organization or business entity currently located at the physical address written on the piece of mail to "change the address (but not the addressee's name)" on that mail to allow it to be redirected to the addressee (that is, to the

individual or business entity whose name appears on that piece of mail but who no longer is located at that physical address).

Here, the mail in dispute is being sent to Eagle Forum at a physical address (P.O. Box 618 and 322 State Street), not to Eagle Forum at Eagle Trust Fund or another of the many organizations and business entities also located at that physical address. Therefore, DMM § 507.2.1.5 does not apply and does not prohibit the change of address sought by Eagle Forum.

The Schlaflys' position that multiple organizations should be considered as the addressee for mail sent only to Eagle Forum incorrectly interprets postal regulations. Unless the face of a piece of disputed mail indicates that it is directed to Eagle Forum and to another business entity, for purposes of these mail delivery regulations, only one addressee is involved. I agree with Eagle Forum that, for purposes of DMM § 508.1.1.1, if the words on a piece of mail identify only Eagle Forum, Eagle Forum is the addressee which is allowed to control delivery of that mail. In the absence of a piece of mail identifying Eagle Forum and another business entity as recipients, I will not infer a contrary intent because Eagle Forum shared the same physical mailing address with other business entities.

As the only mail here in dispute is that directed to Eagle Forum (or Eagle Forum, Attention: Phyllis Schlafly), and Eagle Forum has moved, it remains entitled to redirect such mail to its present address. After the Initial Decision was issued, Eagle Forum's president, Eunie Smith (see Findings 5, 9), directed that all mail addressed to Eagle Forum at P.O. Box 618, Alton, IL 62002, and 322 State Street,

Suite 301, Alton, IL 62002 be delivered to Eagle Forum's current office at 200 W. 3rd Street, Suite 502, Alton, Illinois 62002. By separate Order, I will so instruct the Alton Postmaster. None of the alternative relief requested by the Schlaflys is appropriate, and mail addressed to other entities at P.O. Box 618 and 322 State Street, Suite 301 in Alton, Illinois will be delivered as addressed.

The Schlaflys' appeal is denied.

/s/ Gary E. Shapiro Judicial Officer



JUDICIAL OFFICER

2101 Wilson Boulevard Suite 600 Arlington Va 22201-3078

703-812-1900

Fax: 703-812-1901

October 24, 2017

THE POSTMASTER AT: Alton, Illinois

RE: :In the Matter of a Mail

Dispute Between

EAGLE FORUM

and

JOHN SCHLAFLY & BRUCE SCHLAFLY

P.S. Docket No. MD 17-13

All mail currently being held or hereafter received, addressed to Eagle Forum at P.O. Box 618, Alton, IL 62002, and 322 State Street, Suite 301, Alton, IL 62002 shall be delivered to Eagle Forum's current office at 200 W. 3rd Street, Suite 502, Alton, Illinois 62002.

/s/

Gary E. Shapiro Judicial Officer

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EAGLE TRUST FUND,
322 State Street, Ste 301
Alton, IL 62002-6135,
JOHN F. SCHLAFLY,
322 State Street, Ste 301
Alton, IL 62002-6135,
in his official capacity as
trustee of EAGLE TRUST
FUND,
and

EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, 322 State Street, Ste 301 Alton, IL 62002-6135, Plaintiffs,

v.

U.S. POSTAL SERVICE, 475 L'Enfant Plaza SW Washington, DC 20260-2200, and

MEGAN J. BRENNAN, POSTMASTER GENERAL, 475 L'Enfant Plaza SW Washington, DC 20260-2200, in her official capacity, Defendants. Civil Action No. 1:17-cv-2450-KBJ

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Eagle Trust Fund, John F. Schlafly, and Eagle Forum Education & Legal Defense Fund seek

declaratory and injunctive relief based on the following allegations.

NATURE OF THE ACTION

1. Plaintiffs bring this action both (a) to reverse a final order of the United States Postal Service ("USPS") that "mail currently being held or hereafter received, addressed to Eagle Forum at P.O. Box 618, Alton, IL 62002, and 322 State Street, Suite 301, Alton, IL 62002 shall be delivered to Eagle Forum's current office at 200 W. 3rd Street, Suite 502, Alton, Illinois 62002" (the "USPS Order"), and (b) to ensure the delivery of mail addressed to "Eagle Forum" to the intended recipient.

PARTIES

- 2. Plaintiff Eagle Trust Fund ("ETF") is a trust settled by the late Phyllis Schlafly under Illinois law on June 2, 1967 with amendments on or about May 10, 1996, and June 1, 2016 and headquartered in Alton, Illinois. Two of Mrs. Schlafly's sons plaintiff John F. Schlafly and non-party Bruce S. Schlafly are ETF's current trustees, and as such are the sole members of ETF, an unincorporated association. ETF was not a party to the administrative proceedings before USPS, but is a real party in interest authorized by District of Columbia law to sue in its own name to enforce a substantive right to ETF's mail under the U.S. Constitution and federal law as the intended ultimate recipient of some of the disputed mail.
- 3. Plaintiff Eagle Forum Education & Legal Defense Fund ("EFc3") is a non-profit Illinois corporation headquartered in Saint Louis, Missouri, and registered under §501(c)(3) of the Internal Revenue Code. In addition to its Saint Louis headquarters, plaintiff EFc3 also operates out of

ETF's office in Alton, Illinois, and maintains an office in Washington, DC. EFc3 was not a party to the administrative proceedings before USPS, but is a real party in interest authorized by District of Columbia law to sue in its own name to enforce a substantive right to EFc3's mail under the U.S. Constitution and federal law as the intended ultimate recipient of some of the disputed mail.

- 4. Plaintiff John F. Schlafly is a trustee of plaintiff ETF and an officer and director of plaintiff EFc3; plaintiff John Schlafly brings this suit in those official capacities. Mr. Schlafly was a party to the administrative proceedings before USPS and is the intended ultimate recipient of some of the disputed mail.
- 5. Defendant United States Postal Service ("USPS") is an independent establishment within the executive department of the United States government.
- 6. Eagle Forum ("EFc4") an Illinois non-profit corporation based in Alton, Illinois, and registered under §501(c)(4) of the Internal Revenue Code was a party to the administrative proceedings before USPS. Although the initial complaint named EFc4 as a defendant and requested relief against EFc4 with respect to Plaintiffs' mail diverted to EFc4 by the federal defendants, this amended complaint drops EFc4 as a defendant to cure EFc4's assertion of allegedly improper venue. If EFc4 intervenes in this action, the "other relief as may be just and proper" requested in Paragraph 72(D) shall include *inter alia* the following relief against EFc4:
 - (a) Declaratory relief that EFc4 has a legal obligation to turn over mail intended for plaintiffs ETF or EFc3, or for any other related Eagle entities;

- (b) Declaratory relief that, for any mail received and opened by EFc4 that was addressed to "Eagle Forum" at any address and that includes a donation whether monetary or otherwise that the donor intended as tax deductible, the mail and donation were intended for receipt by EFc3;
- (c) Injunctive relief establishing a constructive trust is created over all mail addressed to "Eagle Forum" at ETF's and EFc3's addresses (currently, 322 State Street and P.O. Box 618 in Alton, Illinois), but received by EFc4 on or after the USPS Order's effective date through the final judgment of this litigation, inclusive of any appeals; and
- (d) Injunctive relief ordering EFc4 to perform and submit to the Court and parties an accounting of all mail addressed to "Eagle Forum" at ETF's and EFc3's addresses (currently, 322 State Street and P.O. Box 618 in Alton, Illinois), but received by EFc4 on or after the USPS Order's effective date through the final judgment of this litigation, inclusive of any appeals, as well as any funds received by EFc4 during that same period.

JURISDICTION AND VENUE

- 7. This action seeks judicial review of USPS's resolution of the underlying postal dispute and, therefore, raises federal questions over which this Court has jurisdiction pursuant to: 28 U.S.C. §§1331, 1361; the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended); D.C. Code §11-501; and this Court's equity jurisdiction.
- 8. The United States has waived its sovereign immunity for actions against USPS and for the relief sought in Paragraph 72. See 39 U.S.C. §409. Further, mandamus claims under 28 U.S.C. §1361 against a named federal officer do not require a waiver of

sovereign immunity.

- 9. Pursuant to 28 U.S.C. §1391(e)(1)(A), venue is proper in the District of Columbia because all defendants maintain offices within the District of Columbia.
- 10. An actual and justiciable case or controversy exists between the parties.

Justiciable Case or Controversy between the Parties

- 11. As a direct consequence of USPS's final decision and order in the administrative proceedings, Plaintiffs face the prospect of losing mail that senders intended Plaintiffs to receive, including donations that senders intended to benefit Plaintiffs.
- 12. Even assuming *arguendo* that defendant EFc4 returned to plaintiff EFc3 all of the donations that senders intended for EFc3 including, but not limited to, any donations that the sender intended as tax-deductible donations the delay in EFc3's receiving the donations would cost EFc3 accumulated interest for the time during which the donated funds would be deposited later than if EFc3 had received the donations directly.
- 13. If the Court grants the relief requested in Paragraph 72, Plaintiffs will receive the mail and donations that the senders intended to benefit and inform Plaintiffs.
- 14. Plaintiffs lack any other adequate remedy to ensure their timely receipt of mail and donations that the senders intended to benefit and inform Plaintiffs.
- 15. Because this Court has jurisdiction as a threshold matter, the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, provides this Court the power to "declare the rights and other legal relations of any

interested party..., whether or not further relief is or could be sought." 28 U.S.C. §2201.

16. Principles of administrative exhaustion do not preclude participation by ETF or EFc3 both because the organizations participated through their respective trustees, officers, and directors and because the participating trustees, officers, and directors raised – or can raise – the issues that ETF and EFc3 seek to raise.

Availability of Judicial Review

- 17. Although Congress has exempted USPS from the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), see 39 U.S.C. §410(a), that exemption does not remove USPS from non-APA judicial review. Indeed, nonstatutory review of federal agency action grew out of an action against USPS long before APA's enactment, Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), which this Circuit has recognized as "the font of the nonstatutory review doctrine." Trudeau v. FTC, 456 F.3d 178, 190 n.21 (D.C. Cir. 2006).
- 18. The general standard of review in non-APA actions resembles the APA standard of review in requiring reasoned decisionmaking to uphold an agency, which is lacking where an agency action fails to distinguish contrary agency precedent, fails to follow agency rules, or fails to resolve the whole issue properly before the agency.
- 19. Further, under this Court's historic and unique equity jurisdiction cited in Paragraph 7, equity review is also available in this Court, see, e.g., Kendall v. U.S. ex rel. Stokes, 37 U.S. (12 Pet.) 524, 580-81 (1838); Ganem v. Heckler, 746 F.2d 844, 851 (D.C. Cir. 1984), but would not be available in any other U.S.

district court.

- 20. Notwithstanding the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 605 (1970) ("DCCRA"), this Court's equity jurisdiction survived DCCRA's enactment, as Congress indicated six years later in the legislative history of the 1976 amendments to APA and federal-question jurisdiction. H.R. REP. No. 94-1656, at 15-16, reprinted in 1976 U.S.C.C.A.N. 6121, 6136.
- 21. Because it requires "clear and manifest" legislative intent to support repeals by implication, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007), it would require "clear and manifest" evidence of congressional intent to repeal this Court's equity jurisdiction to argue that DCCRA somehow repealed this Court's equity jurisdiction for federal matters, especially given that both Congress and the D.C. Circuit have relied upon this Court's equity jurisdiction after DCCRA's enactment.

LEGAL BACKGROUND

- 22. The Constitution empowers Congress "[t]o establish Post Offices and post Roads." U.S. CONST. art. I, §8, Cl. 7. Under this authority, Congress established USPS, 39 U.S.C. §§101-5605, with the ability to sue and be sued, *id.* §§401(1), 409, and to adopt and amend rules for its operations. *Id.* §401(2).
- 23. USPS has promulgated its rules of practice for mail disputes at 39 C.F.R. part 965, which provide for submission of disputes for an "initial decision" to a "presiding officer," *id.* §965.11, and an optional appeal to the "Judicial Officer." *Id.* §965.12. Moreover, there are no provisions for seeking reconsideration based on after-arising grounds or information: "The Judicial Officer's decision on appeal or his or her final order is

the final agency decision with no further agency review or appeal rights." *Id*.

- 24. Unlike appellate decisions from Article III courts, the Judicial Officer's textual analysis to *deny* an administrative appeal does not change the findings in the presiding officer's initial decision that underlies the denied appeal: "If an appeal is denied, the initial or tentative decision becomes the final agency decision upon the issuance of such denial." *Id*.
- 25. Under longstanding USPS precedents stretching back to the 1800s, USPS must determine the *likely* intended recipient when mail pieces are addressed to entities with confusingly similar names:

When two firms that have used the same or confusingly similar names and mailing addresses enter conflicting orders at the post office for the delivery of the same mail, delivery will be made to the firm that is the most likely recipient intended by the senders. *R. Michael Joyce*, P.S. Docket No. MD 95-175, June 14, 1995; see Vol. I, *Opinions of the Solicitor of the Post Office Department*, p. 860 (1883).

Stricklin and Moody, MD 98-248 (P.S.D. July 15, 1998). The question presented is one of determining who is "likely intended by the sender for delivery" of the mail piece in question. *Id*.

26. In its operations manual, USPS has memorialized the rule of these precedents:

Unless persons with similar names adopt some means to distinguish their mail, a postmaster must use judgment in making delivery.

Postal Operations Manual §611.2 (captioned "Delivery to Persons With Similar Names").

- 27. "A person receiving mail not intended for him or her must promptly return it to the Post Office." *Id.* §611.3. In cases of confusingly similar names, "if either party receives mail that belongs to the other, they are to promptly forward it to the proper party." *Stricklin and Moody*, MD 98-248 (P.S.D. July 15, 1998).
- 28. In its operations manual, USPS limits the ability to file change-of-address requests for Post Office Boxes:

Customers may file change-of-address orders, as follows:

a. Organizations. Only the PO Box customer or authorized representatives of the organization listed on the PS Form 1093 may file change-of-address orders. The organization is responsible for forwarding mail to other persons receiving mail at the box.

Postal Operations Manual §841.751 (captioned "Who May File").

29. Constructive trusts are a flexible remedial device used to force restitution in order to prevent unjust enrichment, even if the inequitable conduct falls short of fraud. Under the law of both Illinois and the District of Columbia, the equitable remedy of a constructive trust is available not only for more culpable inequities (e.g., embezzlement, conversion, fraud, duress), but also for mere mistake. Hertz v. Klavan, 374 A.2d 871, 873 (D.C. 1977); Suttles v. Vogel, 126 Ill.2d 186, 193-94, 533 N.E.2d 901, 904-05 (Ill. 1988).

FACTUAL BACKGROUND

30. This case involves one aspect - mail - of an

ongoing wider dispute by EFc4 and its current directors against the network of Eagle-themed conservative educational, advocacy, and policy groups that Phyllis Schlafly created during more than fifty years of public service.

Status Quo Prior to Takeover Attempt by a Faction of EFc4's Board

- 31. Since the 1960s, Mrs. Schlafly branded her educational, advocacy, and policy groups and their activities with the "Eagle," including the formation of ETF in 1967. Over the next 50 years, she added numerous Eagle entities some incorporated, some not including EFc4 (1975) and the largest Eagle entity, EFc3 (1981).
- 32. ETF publishes *The Phyllis Schlafly Report* and, until October 2016, managed mail, donation solicitation services, online content, and other "back office" functions for all of the "Eagle" entities, which ETF continues to do for all but EFc4. All of Mrs. Schlafly's Eagle entities functioned in consonance from 1967 until 2016, and ETF's back-office functions included sorting and routing the mail addressed to "Eagle Forum" at the Alton, Illinois, address used by all Eagle entities.

Takeover Attempt by a Faction of EFc4's Board

- 33. In April 2016, six of EFc4's directors secretly agreed among themselves to try to take control of EFc4, based in part on their holding political and social positions dissonant with Mrs. Schlafly and the other Eagle entities.
- 34. On April 11, 2016, the six EFc4 directors held an unprecedented telephonic meeting to purport to remove EFc4's president and to remove Phyllis Schlafly and John Schlafly from their longstanding

authority over EFc4's accounts and assets.

- 35. On April 10, 2016, in advance of that telephonic meeting, Mrs. Schlafly wrote the six EFc4 directors to ask them to resign.
- 36. On August 16, 2016, Mrs. Schlafly released a video recording and open letter formally and expressly revoking any and all existing licenses that EFc4 held to use her name, image, and likeness, as well as any intellectual property under her control.
- 37. On October 20, 2016, in a dispute between some of the parties here, an Illinois state court's temporary restraining order ("TRO") temporarily transferred interim control of EFc4 to six directors of EFc4's board.

Disputed Mail

- 38. As referenced in the USPS administrative decisions, the disputed mail is addressed to "Eagle Forum" at EFc3's and ETF's address in Alton, Illinois (currently, currently, 322 State Street and P.O. Box 618); some of that disputed mail also includes "Phyllis Schlafly" or "Attention: Phyllis Schlafly" in addition to "Eagle Forum."
- 39. In the aftermath of the USPS Order, however, the disputed mail has widened to include other permutations involving mail addressed to Plaintiffs' street and Post Office Box addresses with an Eagle-themed addressee. For example, mail addressed to the following addressees at Plaintiffs' street and Post Office Box addresses all were misdirected to EFc4: Eagle Forum dba Eagle Accounts Payable; Eagle Forum, Att'n John Schlafly; and Eagle Forum, Education Desk; Eagle Forum Education & Legal

Defense Fund.¹

- 40. Some of the disputed mail consists of Business Reply Envelopes ("BREs"), which are addressed to "Eagle Forum, Attn: Phyllis Schlafly" at ETF's Post Office Box; ETF printed the BREs for supporters, donors, and interested parties to use for return correspondence to all Eagle entities affiliated with ETF, with ETF's understanding that ETF staff would sort and allocate mail and donations properly in accordance with the senders' and donors' intent.
- 41. Since October 24, 2017, ETF has been charged for more than 24 pieces of business-reply mail that it did not receive, presumably because these BREs were diverted to EFc4.
- 42. On information and belief, which likely could be proved with the opportunity for discovery, since its current board took charge of EFc4 on or about October 20, 2016, EFc4 has obtained and retained donations intended for EFc3 and ETF and otherwise not intended for EFc4, including donations that donors intended as tax deductible.
- 43. One envelope diverted to EFc4 had the handwritten addressee "Eagle Forum" by an EFc3 vendor and transmitted an invoice to EFc3. The way that the vendor addressed the envelope is consistent with the presiding officer's finding not reversed by the Judicial Officer that "Eagle Forum" is ambiguous with respect to distinguishing between EFc4 and the other Eagle-themed entities that Mrs. Schlafly founded. *Eagle Forum and Schlafly*, MD 17-

¹ In listing these permutations, a comma means a line break (e.g., "John Schlafly, Eagle Forum" refers to a two-line addressee, with John Schlafly on the first line and Eagle Forum on the second line).

- 13 (P.S.D. Sept. 15, 2017).
- 44. Consistent with the "Updating Your Information" section of Form 1093 which provides inter alia that "[t]he information on your PS Form 1093 must always be current" and "[a]s soon as any information changes ... you are responsible for updating the information" Mr. Schlafly filed a corrected Form 1093 on September 18, 2017, which USPS did not complete (as to the USPS portions of the form) or stamp as filed until the morning of December 1, 2017. The updated Form 1093 indicates that John Schlafly is the USPS customer or authorized representative on the Form 1093 (the "boxholder").
- 45. On or about December 27, 2017, ETF renewed its contract with USPS for Post Office Box 618, with an effective date of January 1, 2018.
- 46. USPS's human and computer-aided mail-sorting and mail-directing systems are neither designed to nor capable of accurately sorting mail with overlapping, similar addressees, such as the examples in Paragraph 39; these systems will misdeliver the mail when presented with such addressees.

EFc3's Use of "Eagle Forum" and Other Reasons that Mail Addressed to "Eagle Forum" Likely Would Not Be Intended for EFc4

- 47. Defendants EFc4 and USPS acknowledged in the USPS proceedings that the name "Eagle Forum" could refer to "any of Mrs. Schlafly's organizations, including Eagle Trust, Eagle Forum, and Eagle Forum Education and Legal Defense Fund" (*i.e.*, ETF, EFc4, and EFc3, respectively). *Eagle Forum and Schlafly*, MD 17-13 (P.S.D. Sept. 15, 2017).
 - 48. EFc3 is routinely called "Eagle Forum." See,

- e.g., Texas Office of Attorney General, AG Paxton Thanks 42 Congressional Members, 15 States, Bioethics Expert, and Eagle Forum for Filing Amicus Briefs in Support of Texas' Fight to Defund Planned Parenthood (Aug. 15, 2017) (using "Eagle Forum" to refer to EFc3); Eldred v. Ashcroft, 255 F.3d 849, 853 (D.C. Cir. 2001) (same) (Sentelle, J., dissenting from denial of rehearing en banc); Miller v. Davis, No. 15-5880, 2015 U.S. App. LEXIS 23060 (6th Cir. Aug. 26, 2015) (same); Planned Parenthood of Kan. & Mid-Mo. v. Moser, No. 11-3235 (10th Cir. Oct. 24, 2011) (same); Kaili Joy Gray, Phyllis Schlafly Knows Who Is Destroying America (Pregnant Women With Jobs, Duh), WONKETTE (Dec. 5, 2014) (same).
- 49. Before Mrs. Schlafly asked the rogue EFc4 directors to resign, the use of EFc3's name -i.e., the "Eagle Forum" name by which EFc3 is known together with EFc3's address suggested that the sender intended the mail piece for EFc3 at least as much as the use of EFc4's name together with EFc4's former address suggested that the sender intended the mail piece for EFc4.
- 50. For BREs that ETF printed, the sender's intent in returning the business reply is derivative of the printer's intent (namely, that the BRE reach ETF). The sender intends a BRE to reply to the business that provided the BRE in the manner that the printing business intended.
- 51. Finally, with respect to mail addressed not merely to "Eagle Forum" but also with some form of Mrs. Schlafly's name included, the fact that Mrs. Schlafly asked the rogue EFc4 directors to resign make it highly unlikely that mail addressed in part to Mrs. Schlafly would be intended to reach EFc4, especially after Mrs. Schlafly revoked EFc4's license

to use her name.

COUNT I

LACK OF REASONED DECISIONMAKING FOR MAIL ADDRESSED TO "EAGLE FORUM" AT EFC3'S AND ETF'S ADDRESS

- 52. Plaintiffs incorporate Paragraphs 1-51 and 58-72 as if fully set forth herein.
- 53. The underlying USPS decision upheld by the USPS Order acknowledges under the Heading "Sender's Intent" that the use of "Eagle Forum" is ambiguous:

The parties agree that such mail addressed to Eagle Forum can actually be intended for any of Mrs. Schlafly's organizations, including Eagle Trust, Eagle Forum, and Eagle Forum Education and Legal Defense Fund[.]

Eagle Forum and Schlafly, MD 17-13 (P.S.D. Sept. 15, 2017). But that decision and the USPS Order affirming it go on to simply hold that EFc4 should receive all mail addressed to Eagle Forum, notwithstanding the admitted ambiguity of "Eagle Forum" as an addressee. *Id.*; Eagle Forum and Schlafly, MD 17-13 (P.S.D. Oct. 24, 2017).

- 54. To acknowledge that "Eagle Forum" is ambiguous and then to find EFc4 nonetheless entitled to mail addressed to "Eagle Forum," based only on that ambiguous name, is to beg the question of the sender's intent in addressing the mail piece. Failing to resolve the ambiguity or even to attempt to resolve the ambiguity by considering the address used and by attempting to determine the most likely intended recipient violates USPS precedent and the reasoned-decisionmaking standard.
- 55. For any given mail piece addressed to "Eagle Forum" at ETF's and EFc3's address, it is more likely

than not that the sender intended the mail to reach ETF to sort and route to the appropriate Eagle entity or that the sender intended EFc3 as the ultimate recipient.

- 56. To the extent that a mail piece includes a donation monetary or otherwise that the sender intended as a tax-deductible donation, the mail piece and donation were not intended for EFc4, for which donations are not tax deductible to the donor. The greater amount donated is intended for EFc3 rather than for EFc4.
- 57. For the foregoing reasons, defendant USPS's administrative order fails to meet the standard for reasoned decisionmaking and is arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires*, and without observance of procedure required by law.

COUNT II LACK OF REASONED DECISIONMAKING FOR MAIL ADDRESSED TO "EAGLE FORUM, ATTN: PHYLLIS SCHLAFLY" AT EFC3'S AND ETF'S ADDRESS

- 58. Plaintiffs incorporate Paragraphs 1-57 and 61-72 as if fully set forth herein.
- 59. Assuming *arguendo* that mail addressed to "Eagle Forum" at EFc3's and ETF's address were not more likely to have been intended for ETF to sort or for EFc3 outright, it would nonetheless remain unreasonable to treat mail address to "Eagle Forum, Attn: Phyllis Schlafly" or words to that effect incorporating Mrs. Schlafly's name into the address to be intended for EFc4 after the EFc4 broke faith with Mrs. Schlafly in the lead-up to the disputed April

- 11, 2016, telephonic board meeting and Mrs. Schlafly's letter dated April 10, 2016, asking the six directors to resign and *a fortiori* after she revoked EFc4's license to use her and ETF's intellectual property including her name, likeness, and works on August 16, 2016.
- 60. For the foregoing reasons, even assuming arguendo that mail addressed to "Eagle Forum" were not likely intended for plaintiffs EFc3 and ETF, defendant USPS's administrative order with respect to mail addressed to "Eagle Forum, Attn: Phyllis Schlafly" or words to that effect incorporating Mrs. Schlafly's name into the address would fail to meet the standard for reasoned decisionmaking and would be arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires*, and without observance of procedure required by law.

COUNT III

FAILURE TO FOLLOW USPS'S PROHIBITION ON SPLITTING MAIL ADDRESSED TO POST OFFICE BOXES

- 61. Plaintiffs incorporate Paragraphs 1-60 and 68-72 as if fully set forth herein.
- 62. USPS does not allow everyone who receives mail at a Post Office Box to file change-of-address forms. Instead, only the customer or authorized representative on the Form 1093 (*i.e.*, the boxholder) may file a change-of-address form, and the boxholder must forward any mail addressed to other persons individuals or organizations who have moved to another address. *Postal Operations Manual* §841.751 (quoted in Paragraph 28).
 - 63. Notwithstanding that its operations manual

limits who may file a change-of-address form and requires the boxholder to forward mail to others who no longer wish to receive mail at the Post Office Box, the USPS administrative decisions allowed EFc4 to file a change of address with respect to Post Office Box 618 and to split the mail stream going to Post Office Box 618.

- 64. Prior to USPS's accepting the current Form 1093, see Paragraph 44, USPS hearing officers might or might not have viewed the thenoperative Form 1093 as ambiguous and thus not relevant to deciding the mail dispute presented to USPS. (The USPS administrative proceeding declined to address which access to and control of Post Office Box 618.)
- 65. Whatever the ambiguity existed in Form 1093 filings before December 1, 2017, it is now clear that plaintiff John Schlafly is the boxholder.
- 66. Even assuming arguendo that USPS correctly analyzed the application of the facts and the law with respect to mail addressed "Eagle Forum" at Plaintiffs' street address, USPS nonetheless improperly analyzed the facts and law with respect to Post Office Box 618 by failing to follow Postal Operations Manual §841.751, which requires that all mail addressed to that Post Office Box go to that Post Office Box, with the boxholder's having the obligation to forward any mail intended for others who no longer wish to receive mail at that address.
- 67. For the foregoing reasons, defendant USPS's bifurcation of the mail directed to Post Office Box 618 fails to meet the standard for reasoned decisionmaking and is arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the

law, in excess of authority granted by law, *ultra vires*, and without observance of procedure required by law.

COUNT IV VIOLATION OF DUE PROCESS

- 68. Plaintiffs incorporate Paragraphs 1-67 and 72 as if fully set forth herein.
- 69. USPS's administrative review provisions violate due process by failing to provide for reconsideration, based on after-arising grounds or evidence (e.g., the revised Forum 1093 in Paragraph 44 and the updated rental period in Paragraph 45). Once the new Form 1093 became operative, it would have been clear not only that Plaintiffs and not EFc4 are the sole, rightful customers for Post Office Box 618, but also that USPS could not order the bifurcation of the mail directed to Post Office Box 618 without first amending its rules.
- 70. Notwithstanding whatever time limits may apply to direct review of agency action to promulgate regulations, a party injured by application of those regulations may seek judicial review of the claimed deficiencies in a judicial action applying those regulations.
- 71. For the foregoing reasons, defendant USPS's administrative review provisions fail to meet the standard for reasoned decisionmaking and are arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires*, and without observance of procedure required by law.

PRAYER FOR RELIEF

72. WHEREFORE, Plaintiffs respectfully ask this Court to grant the following relief.

- A. Pursuant to 28 U.S.C. §§1331, 1361, 1651(a), 2201-2202, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code §11-501, Fed. R. Civ. Proc. 57, and this Court's equitable powers, a Declaratory Judgment that:
 - (i) Mail addressed to "Eagle Forum" at plaintiffs ETF's and EFc3's addresses (currently, 322 State Street and P.O. Box 618 in Alton, Illinois) is likely intended for plaintiff ETF to sort and distribute to the various Eagle entities and therefore should be delivered to plaintiff ETF;
 - (ii) As the presiding officer held and the Judicial Officer did not overturn, the phrase "Eagle Forum" is ambiguous with respect to its reference to plaintiff EFc3 visa-vis nonparty and former defendant and potential intervenor EFc4.
- B. Pursuant to 28 U.S.C. §§1331, 1361, 1651(a), 2202, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code §11-501, and this Court's equitable powers, an Order providing that:
 - (i) The USPS Judicial Officer's Order directed to the Postmaster in Alton, Illinois, and the accompanying Postal Service Decision, both dated October 24, 2017, are vacated; and
 - (ii) Defendants USPS and Postmaster General Brennan – together with all those acting under those defendants' control – are ordered to deliver all mail addressed to "Eagle Forum" at ETF's and EFc3's

addresses (currently, 322 State Street and P.O. Box 618 in Alton, Illinois) to plaintiff ETF at the address listed on the mail piece as the likely intended recipient to sort the mail or, alternatively, to plaintiff EFc3 as the likely intended ultimate recipient.

- C. Pursuant to 28 U.S.C. §2412 and any other applicable provisions of law or equity, award Plaintiffs' costs and reasonable attorneys' fees.
- D. Such other relief as may be just and proper.

Date Feb. 6, 2018 Respectfully submitted,

/s/

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Fund